Supreme Court, U.S.
FILED
00-370 SEP 6 2000
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No. 00-

IN THE

Supreme Court of the United States

DANIEL MONAHAN, *et al.*,

Petitioners,

v.

NEW YORK CITY DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Second Circuit's application of the *res judicata* doctrine, which is different from other circuits, unduly prejudice litigants?

2. Did the courts below abuse their discretion in allowing defendant-respondents to amend their Answer to include the affirmative defense of *res judicata* a year after the close of the disclosure period to determine if the defense was proper?

3. Did the Second Circuit err in holding that a stipulation agreement is an adjudication on the merits capable of precluding further challenges to the constitutionality of the policies underlying the agreement?

LIST OF PARTIES

The parties to to proceedings below were the petitioners: Daniel Monahan, Evelyn S. Rodriguez, Cecilia Lorde, Luis Almodovar, Fred Silva, Thomas Basil, Robert Netell, Daniel Foynes, Harvey Ball, Daniel Aponte, Gary Nardiello, Vincent Rebecca, Oral Beckford, Alice Bresloff, Irwin Cohen, Jose Cuevas, Dennis Deniro, Ingrid Griffin, Dennisse Ilarraza, Theodore Israel, Sabrina Keyes-Alston, Julie Knowles, Tanya Mann, Michael Messina, John Mickel, Nzingha Moses, Noah Norfleet, Joseph Palermo, Garfield Parkison, Hilda Reyes, Kevin Riley, Ruben Rodriguez, Luis Santiago, Wendy Tyson, Linda Varbero, Willie Wallace, Johnny Watford, Anthony White, Denise Whyte-Phillips and Martine Whyte. And the respondents: New York City Department of Corrections, City of New York, Michael Jacobson, Acting Commissioner, City of New York Department of Correction, Terrance Skinner, Deputy Warden and Commanding Officer of the Health Management Division of the City of New York Dept. of Correction, Johnston, Supervisor Civilian (ID NO. 25835), Peter Mahon, former Deputy Warden and Commanding Officer of the Health Management Division of the City of New York Department of Correction, James Bird, Deputy Warden and Commanding Officer of the Health Management Division of the City of New York Department of Correction and Carol L. Bishop, Assistant Deputy Warden of the City of New York Department of Correction.

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Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided June 8, 2000 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Southern District Of New York Dated July 7, 1998 ..... 37a

The petitioners Daniel Monahan, *et al.*, respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the Unites States Court of Appeals for the Second Circuit, entered in the entitled proceeding on July 8, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 214 F.3d 275 and is reprinted in the appendix hereto, p. 1a, *infra.*

The opinion of the United States District Court for the Southern District of New York is reported at 10 F. Supp. 2d 420 and is reprinted in the appendix hereto, p. 37a, *infra.*

STATEMENT OF JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the petitioners brought this suit in the Southern District of New York. On July 7, 1998, the Southern District: (1) granted respondents' motion for summary judgment; and (2) denied petitioners' motion for summary judgement. *See* p. 51a, *infra.*

On appeal, the Second Circuit on July 8, 2000, entered a judgment and an opinion affirming the Southern District's orders. *See* p. 36a, *infra.* No petition for rehearing was sought.

The jurisdiction of this court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Directive 2262 or the "Sick Leave Policy"

Petitioners are, or were, formerly New York City corrections officers or captains for the New York City Department of Corrections. Corrections officers have daily contact with arsonists, murderers, rapists, and other violent criminals; it is documented that many officers have been savagely beaten and attacked by prisoners. Of the officers in this case, a significant majority utilized sick leave as a result of injuries which they sustained in the line of duty. The nature of their job is hazardous, and places a level of stress on officers that is exceptionally high; therefore, it is essential that all officers be in shape, both physically and mentally, in order to carry out their normal duties. As a result of the job's dangers (e.g. facing killers and rapists on a daily basis), the Department allows its injured or sick corrections officers to have, what the respondents now characterize as, "unlimited" sick leave.

Generally, the sick leave policy requires that an officer, who has reported in sick, must remain in his/her residence for, at least, twenty (20) hours a day, seven (7) days a week, except to receive medical treatment or to obtain prescription medication. Officers typically are assigned four (4) hours of time out-of-residence per day (hereinafter referred to as "recreation hours"). Officers are expected to take care of all of their personal needs during their recreation hours. Officers may leave their place of confinement to visit a health care professional or to obtain prescription medication outside recreation hours as long as the officers notify the Department when they leave their home and when they return home, to ensure that the officers are at their place of confinement. If

an officer is not home when an unannounced visit is conducted, or if an officer does not hear the knock on his door, he/she may lose his/her salary for a one (1) month period. Officers can request to have their recreation hours expanded or shifted; such requests must be made in writing, to the commanding officer of the Health Management Division ("HMD") of the Department. The commanding officer of HMD had the absolute discretion to grant or deny said requests. In certain instances, other supervisory personnel had the authority to grant or deny these requests. Such decisions were made without any written or verbal guidelines. Although this policy has changed over time, these general principles have remained intact throughout the relevant time period.

As was set forth in petitioners' Verified Complaints, the sick leave regulations substantially impaired petitioners' fundamental rights to free exercise of religion, to vote, to travel, to privacy, to their personal liberty, to freely associate, to care for their health and person, and freedom from bodily restraint.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S APPLICATION OF THE DOCTRINE OF *RES JUDICATA* CONFLICTS WITH THIS COURT'S AND THOSE OF OTHER CIRCUITS. THIS CONFLICT HAS RESULTED IN UNDUE PREJUDICE FOR LITIGANTS IN THE INSTANT MATTER AND REQUIRES REVIEW BY THIS COURT.

A. The Second Circuit's application of the doctrine of *res judicata* conflicts with this Court's and those of other Circuits. As a result, the Second Circuit is in need of guidance from this court in the proper application of *res judicata* doctrine.

In the Second Circuit, for *res judicata* to apply, three criteria must be met: (1) the prior action must have been an adjudication on the merits; (2) the party to be precluded must have been a party to, or in privity with, a plaintiff in the prior action; and, (3) the claims to be precluded must have been raised, or could have reasonably been raised in the prior suit. *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 (2d Cir. 1995).

In contrast to the Second Circuit's test, other Circuits, including the Fourth, Seventh, Tenth and Eleventh, require an additional element. Before a plaintiff's claim can be precluded, in each of these circuits, the court must determine that the prior suit afforded plaintiff with **a full and fair opportunity to litigate their claims**. *Nwosun v. General Mills Restaurant, Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997); *Pirela v. Village of North Aurora*, 935 F.2d 909, 913

(7th Cir. 1991); *The Virginia Hospital Assn. v. Baliles*, 830 F.2d 1308, 1311 (4th Cir. 1987); *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1504 (11th Cir. 1984) (emphasis added). This Court has expressed a similar view, "[T]he Court has repeatedly recognized . . . that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate . . . in the earlier case." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414, 66 L. Ed. 2d 308 (1980).

Circuit courts have used different standards to determine if this requirement, of a full and fair opportunity to litigate has been met. In the Fourth Circuit, resolution of this issue is dependent upon the plaintiff having a "direct financial or proprietary interest in the [prior litigation] and whether [the plaintiff] assumed control over that litigation." *Virginia Hospital Association*, 830 F.2d at 1312.

The Tenth Circuit asserts that a failure to provide a party with a full and fair opportunity to litigate is evidenced by, "a deficiency that would undermine the fundamental fairness of the original proceedings." *Nwosun*, 124 F.2d at 1257 (quoting *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1334 (10th Cir. 1988)).

With its decisions in the instant action and previous cases, the Second Circuit has created a precedent that is confusing, prejudicial to litigants, and clearly in conflict with this Court and other Circuits. Only intervention by this Court can ensure future litigants, in the Second Circuit, will receive a full and fair opportunity to litigate their claims.

B. The Second Circuit's application of *res judicata* has resulted in undue prejudice for litigants in the instant matter, and requires review by this Court.

The lower court's failure to include this fourth element (i.e. a full and fair opportunity to litigate claims) in its evaluation of the *res judicata* defense, has materially prejudiced the petitioners. This prejudice is particularly troubling when a party's right to be heard is disregarded as a result. As this Court has explained, the right to be heard, "has little reality or worth unless one is informed of the matter pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). This is even more troubling when it is the right to be heard concerning the constitutionality of the deprivation of the fundamental rights of 40 people in this action and the thousands of others who are subject to this unconstitutional policy.

As petitioners in this case have not had the opportunity to be heard, regarding the outrageous deprivations of their fundamental constitutional rights. The petitioners here, however, were not plaintiffs in *Seabrook, et al. v. Jacobson, et al.*, 153 F.3d 70 (2d Cir. 1998). It was the settlement in the *Seabrook* action, which the Second Circuit held, precluded the claims in the instant action. Without participation in the *Seabrook* action, petitioners can not be said to have had a financial or proprietary interest, as is required by the Fourth Circuit. *Virginia Hospital Assn.*, 830 F.2d at 1312; *See also Moore's Federal Practice*, para .0411 [6], at 446.

Additionally, according to the Fourth Circuit, control of litigation is said to exist when a person or persons can choose the legal theories and proofs used in representing a party to an action. *Virginia Hospital Assn.*, 830 F.2d at 1313. Testing this requirement in light of petitioners' original claims, it is clear that because petitioners had no such control in the *Seabrook* action, they should not have been precluded from having their claims heard.

The Tenth Circuit's test states that a failure to provide a party a full and fair opportunity to litigate is evidenced by, "a deficiency that would undermine the fundamental fairness of the original proceedings." *Nwosun*, 124 F.2d at 1257. Applying this test the facts of the instant matter, it is clear that this fourth element of *res judicata* is not met. First, the facts indicate that plaintiffs in this case were never informed of the *Seabrook* action and did not discover it until after the filing of this suit. As a result, they had no opportunity to either join in the suit or to intervene on their own behalf. Second, the individual plaintiffs who were included in the *Seabrook* action were exempted from the stipulation, and their claims were allowed to proceed. Presumably, if petitioners had knowledge of the *Seabrook* action, and had chosen to intervene, they too would have been exempted from the stipulation. This failure to notify petitioners that an action that might preclude their future claims exists, "undermines the fundamental fairness" of the *Seabrook* action, such that *res judicata* should not have been applied.

Only proper guidance from this Court can ensure that, in the future, the doctrine of *res judicata* will be properly applied and that litigants will not be subject to the undue prejudice caused by the Second Circuit's present interpretation of the doctrine of *res judicata*.

II.

THE LOWER COURT ABUSED ITS DISCRETION, ALLOWING AN AMENDMENT TO PLEADINGS UNDER FED. R. CIV. P. 15(a), MORE THAN A YEAR AFTER DEFENDANTS' ORIGINAL ANSWER. THE RESULT OF WHICH, WAS THE WRONGFUL DISMISSAL OF PETITIONER'S CLAIMS. THIS COURT'S REVIEW IS REQUIRED TO CORRECT THIS MISTAKE AND PREVENT FUTURE INJUSTICE.

The respondents failed to raise the affirmative defense of *res judicata* in a timely manner and have failed to show good cause for such delay. Not only did the respondents fail to assert *res judicata* in their Answers, but they did not make a motion to amend their Answers to include the defense. Rather, respondents ignored the Federal Rules of Civil Procedure, simply proceeding with a motion for summary judgment based upon *res judicata*. The District Court then construed the summary judgment motion as a motion to amend under Fed. R. Civ. P. 15(a).

Rule 15(a) provides that leave to amend "shall be freely given when justice requires." This liberality of pleading or freedom of amendment, however, is limited when there is, "undue delay, bad faith or dilatory motive on the part of the moving party, and undue prejudice to the opposing party." *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). A District Court's decision to grant a party leave to amend under Rule 15 can be reviewed for abuse of discretion and should be, in this case. *Block v. First Blood Associates*, 988 F.2d 344, 349 (2d Cir. 1993); *Tokio Marine & Fire Ins. Co. v. Empl. Ins. Of Wausau*, 786 F.2d 101, 103 (2d Cir. 1986).

When raising the defense of *res judicata* the party wishing to raise it is obliged to plead it at the earliest possible moment. *Evans v. Syracuse City School District*, 704 F.2d 44, 47 (2d Cir. 1983); *see also Totalplan Corporation of America*, 14 F.3d 82 (2d Cir. 1994). In *Evans*, the Second Circuit reversed the District Court's holding to grant defendant's motion to amend its answer based on plaintiff's showing of prejudice, and the absence of any good cause shown for defendant's delay in asserting the defense of *res judicata*. *Id.* In *Block*, the Second Circuit reinforced this requirement by specifically citing *Evans*, and stated, "the longer the period of an unexplained delay, the less will be required of the non-moving party in terms of a showing of prejudice." 988 F.2d 344, 350 (2d Cir. 1993).

As a result of respondents' failure to timely assert *res judicata*, the petitioners have suffered material prejudice. First, as the respondents did not mention the possibility of raising the defense until after discovery was closed, petitioners were unable to conduct any discovery relating to the issue of *res judicata*. In dispute, are issues of whether or not privity of parties between the union and the officers exists. Whether there is privity, between a party against whom claim preclusion is asserted and a party to prior litigation, is a functional inquiry in which the formalities of legal relationships provide clues but not solutions; some courts have held that the inquiry is a factual issue. *Chase Manhattan Bank N.A.*, 56 F.3d at 345, (citing *Expert Elec. Inc. v. Levine*, 554 F.2d 1227, 1233 (2d Cir.)), *cert denied*, 434 U.S. 903, 98 S. Ct. 300 (1977); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908, 96 S. Ct. 210 (1975). Hence, this issue is for a trier of fact to determine, and respondents were unable to conduct any discovery with respect to this issue.

Most alarming is the fact that the lower court found that the *Seabrook* action precluded plaintiffs Irwin Cohen and Julie Knowls (neither of whom is a member of C.O.B.A., and could therefore not be in privity with Norman Seabrook or C.O.B.A., and should never have been precluded by the *Seabrook* action) from bringing their claims. Others may not have paid union dues at times and, therefore had not been in privity. Had petitioners known this was an issue, petitioners would have subpoenaed records from the union during discovery.

Raised below is the argument that the stipulation, on its face, indicates that all parties intended that there would be further litigation with respect to the sick leave policy. If petitioners had known of the respondents plan to raise the defense of *res judicata*, discovery relating to the intent of the parties would have been conducted. The people who negotiated the settlement could have been deposed, and all documents relating to the *Seabrook* action and the settlement thereof would have been demanded and produced. Additionally, the extent of the union's disclosure of the stipulation to its members and the individual members' knowledge and understanding of the stipulation could have been more thoroughly ascertained from union officials and documents. Discovery would have been conducted relating to Seabrook's true intent in settling the matter. For example, was it related to his own political ambitions? Did he settle the case to the benefit of some officers to the detriment of others who whose interests were not truly or adequately represented by Seabrook? Did he have any bias? Did he act improperly in any way? If he was biased or acted improperly, his decision cannot be binding upon the union members as it could not be deemed to establish privity of the parties. Petitioners were prejudiced, as they were unable to conduct discovery with respect to these and other issues.

Additionally, had the petitioners known about the *res judicata* defense, they might have decided to sue the union for failure to properly represent them. Such suits are now time-barred.

The lower court appears to have abused its discretion in a manner that has materially prejudiced the petitioners and its application of the law should be corrected.

III.

THE SECOND CIRCUIT HOLDING THAT STIPULATION AGREEMENTS CAN HAVE PRECLUSIVE EFFECTS CONFLICTS WITH OTHER CIRCUITS. THIS HOLDING RESULTED IN PETITIONERS' CLAIMS BEING WRONGLY DISMISSED, AND THE DECISION SHOULD BE REVERSED BY THIS COURT.

The courts below held that the stipulation agreement entered into by the parties in the *Seabrook* action was an adjudication on the merits. There is support for the notion that a stipulation agreement should not be treated this way for purposes of *res judicata* and collateral estoppel scholars suggest:

> Judgment by consent . . . does not operate as issue preclusion or as claim preclusion against one not party to the agreement even where that person stands in an employer/employee or principal/agent relationship with a party to the consent judgment.

THE RESTATEMENT OF JUDGEMENTS § 51(4) (1982). The Eighth Circuit has adopted this view, holding, "these doctrines

[*res judicata* and collateral estoppel] do not apply where, as here, the issues or causes of action sought to be precluded in a subsequent proceeding were allegedly determined in a stipulation." *Gall v. South Branch National Bank of South Dakota,* 783 F.2d 125, 127 (8th Cir. 1986).

The Eighth Circuit, in holding that issues and claims resolved by stipulation had not been actually litigated, noted a critically important policy reason for this view. If parties believed their compromises would preclude future litigation by themselves or others, they would be less likely to choose this more efficient method of resolving disputes. *United States of America v. Robert E. Young*, 804 F.2d 116, 118 (8th Cir. 1986).

The stipulation in the *Seabrook* action read "Whereas, the parties now desire to resolve the issues arising from **this litigation** without further proceedings." (emphasis added). The courts below took this to show that the parties intended their agreement to have a preclusive effect on any and all future claims related to the facial or as applied constitutionality of the sick leave policy that affects thousands of officers. This reading cannot be correct. This statement simply indicated that the parties sought to end the *Seabrook* action.

In holding that the stipulation agreement is an adjudication on the merits, the Second Circuit sets a disturbing precedent. It in effect, allows a party to waive the constitutional rights of another without providing any notice of such waiver. This violates national labor policy and is contrary to decisions of this Court and the Courts of Appeals which have concurred that the waiver of a protected right must be clearly expressed and unmistakable. *Metropolitan*

Edison Co. v. NLRB, 460 U.S. 693, 708 & n.12, 1035 S. Ct. 1467, 75 L. Ed. 2d 387 (1983); *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982). Nowhere in the *Seabrook* action, or in the agreement that followed is there mention, express or implied of an intention by the parties to waive or even limit the constitutional rights of members of the Correctional Officers Benevolent Association, of which Norman Seabrook was the President.

The courts ruling that the stipulation agreement was intended to be binding is facially incorrect. The lower court erred in this holding, and their decision should be reviewed and reversed by this Court.

CONCLUSION

Petitioners reiterate that the lower court's misapplication of the principles of *res judicata* has resulted in material prejudice, that the court abused its discretion in treating respondents' motion for summary judgment as a motion to amend their answer, and finally, that their reading of the stipulation was simply incorrect. For the reasons stated above, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JUNE 8, 2000

Daniel MONAHAN, Evelyn S. Rodriguez, Cecilia Lorde, Luis Almodovar, Fred Silva, Thomas Basil, Robert Netell, Daniel Foynes, Harvey Ball, Daniel Aponte, Gary Nardiello, Vincent Rebecca, Oral Beckford, Alice Bresloff, Irwin Cohen, Jose Cuevas, Dennis Deniro, Ingrid Griffin, Dennisse Ilarraza, Theodore Israel, Sabrina Keyes-Alston, Julie Knowles, Tanya Mann, Michael Messina, John Mickel, Nzingha Moses, Noah Norfleet, Joseph Palermo, Garfield Parkison, Hilda Reyes, Kevin Riley, Ruben Rodriguez, Luis Santiago, Wendy Tyson, Linda Varbero, Willie Wallace, Johnny Watford, Anthony White, Denise Whyte-Phillips and Martine Whyte,

Plaintiffs-Appellants,

v.

NEW YORK CITY DEPARTMENT OF CORRECTIONS, City of New York, Michael Jacobson, Acting Commissioner, City of New York Department of Correction, Terrance Skinner, Deputy Warden and Commanding Officer of the Health Management Division of the City of New York Dept. of Correction, Johnston, Supervisor Civilian (ID NO. 25835), Peter Mahon, former Deputy Warden and Commanding Officer of the Health Management Division of the City of New York Department of Correction, James Bird, Deputy Warden and Commanding Officer of the Health Management Division of the City of New York

Appendix A

Department of Correction and Carol L. Bishop, Assistant Deputy Warden of the City of New York Department of Correction,

Defendants-Appellees.

Docket No. 98-9067

Argued March 31, 1999

Decided June 8, 2000

* * *

Before: LEVAL and SACK, Circuit Judges, and MORAN,* Senior District Judge.

MORAN, Senior District Judge.

Plaintiffs-appellants are current and former New York City correction officers and captains. They appeal from a judgment of the District Court for the Southern District of New York (Rakoff, J.) dismissing with prejudice their consolidated challenge to the sick leave policy of the New York City Department of Correction ("DOC"). Embodied in DOC Directive 2262, the policy permits an eligible officer continuous sick leave for up to one year provided the officer remains at home. Appellants claim the home confinement provision of Directive 2262 is facially violative of the First,

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* Honorable James B. Moran, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

Fourth, Fifth and Fourteenth Amendments of the Constitution and has been unconstitutionally applied to individual DOC employees.

The district court found that most of plaintiffs' constitutional claims were res judicata based on an earlier lawsuit by the president of the Correction Officers' Benevolent Association ("COBA"), the exclusive bargaining agent for New York City correction officers. The remaining counts were dismissed by the court pursuant to Rule 56 for a failure to aver admissible evidence in support of each claim. On appeal, the officers contend that the prerequisites for res judicata are not present here and, in any event, the district court abused its discretion when it allowed defendants to assert the defense "in the eleventh hour of litigation." Because we conclude that the former suit by COBA president Norman Seabrook barred the subsequent relitigation of plaintiffs' claims and that plaintiffs were not prejudiced by the late assertion of res judicata, we affirm.

BACKGROUND

New York City correction officers regularly confront dangerous and stressful working conditions. Many are injured in the line of duty. Because it is difficult to recruit and retain qualified individuals for these positions, COBA has successfully bargained and secured for its members a generous benefits package, including the "unlimited" sick leave policy at issue here. First implemented in 1987, DOC Directive 2262 generally permits a correction officer to report in sick for periods of up to one year provided he or she stays at home except for authorized medical departures. In 1988,

the policy was amended to permit certain officers taking sick leave to be 24 hours out-of-residence so long as certain reporting requirements were fulfilled. Those officers ineligible for the full-day permit were granted a four hour "recreation" period (known as "rec" hours) to attend to their personal needs and were relieved of the obligation to log in and out when leaving home.

By 1993, DOC officials suspected that the liberalized sick leave policy was being widely abused. An audit found that much of the documentation submitted by officers for their authorized departures did not substantiate their participation in the reported activity. The audit team recommended that officers on sick leave be limited to their four "rec" hours for all personal activities and that additional hours out-of-residence not be granted. When Terrence Skinner became commanding officer of the Health Management Division ("HMD") in 1995, he implemented many of the auditors' recommendations, tightening up enforcement of Directive 2262 and limiting 24 hour out-of-residence privileges to officers injured in the line of duty. According to the DOC, the new enforcement mechanisms reduced daily sick rates by 35% and allowed the department to more evenly distribute the work load across the uniformed work force.

Correction officers subject to the revised policy were not so enthusiastic. On October 13, 1995, COBA President Norman Seabrook and two individual officers filed a civil action in the Eastern District of New York, challenging the constitutionality of Directive 2262's home confinement provisions. See *Seabrook v. Jacobson,* No. 95 Civ. 4194(FB)

(E.D.N.Y.) (the "*Seabrook*" action). The complaint, brought by Seabrook "in his capacity as President of the Correction Officers' Benevolent Association," sought compensatory damages for plaintiffs, punitive damages, a declaratory judgment finding Directive 2262 facially unconstitutional, and equitable relief on behalf of "correction officers entitled to sick leave." On April 9, 1996, the *Seabrook* suit settled, resulting in a "Stipulation and Order of Settlement and Discontinuance" ("stipulation") approved by the district court. The complete text of the stipulation is as follows:

> WHEREAS, plaintiffs, NORMAN SEABROOK, in his capacity as President of the Correction Officers' Benevolent Association, PATRICIA TAYLOR and BELINDA RUDDER, commenced this action alleging that Section VII of defendants' sick leave policy, Directive 2262, is unconstitutional on its face and as applied, and violated their constitutional rights and the rights of similarly situated sick employees in violation of 42 U.S.C. § 1983, and;
>
> WHEREAS, defendants assert that the Department of Correction sick leave policy is patently constitutional and justified by a variety of constitutionally sufficient state interests, and deny any and all liability arising out of plaintiffs' allegations; and
>
> WHEREAS, the parties now desire to resolve the issues arising from this litigation without further proceedings;

Appendix A

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned as follows:

1. The above-referenced action is hereby dismissed, with prejudice, and without costs, expenses and fees;

2. Within five days of the Court's signing of this order, defendants agree to amend Section VII of Directive 2262, in the form as annexed hereto as Exhibit "A".

3. This Court retains jurisdiction over this action. If the Department of Correction intends to modify Section VII of Directive 2262, 30 days notice of any such change must be provided to the Correction Officers' Benevolent Association ("COBA"), and either party may move to reopen this matter. This paragraph's requirement of notice to COBA expires on January 1, 1998.

A fourth paragraph stipulating to the dismissal with prejudice of two related suits[1] was crossed out before the parties signed the stipulation.

Pursuant to the parties' agreement, Directive 2262 was amended effective April 22, 1996, consistent with Exhibit A. The Directive now provides that unless officers are classified

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1. *Ball v. Sielaff*, 90 Civ. 4456(FB) (E.D.N.Y.); *Palozzolo v. Abate*, 92 Civ. 3305(FB) (E.D.N.Y.).

as "sick leave abusers" they will not be confined to their residence for the first eight days of leave. Beyond this initial grace period, the leave policy differentiates between officers injured in the line of duty and those who are "otherwise out on sick leave." Officers who report sick as the result of a verified line-of-duty injury and who have a definite return-to-duty date within two weeks of the date they visit an HMD physician are not confined to their residences. An officer injured in the line of duty without a definite return date is subject to home confinement, but may apply to HMD for additional time out-of-residence so long as the officer has a sick leave history of 8 days or less per year for 3 years, has not been classified as a "sick leave abuser," has a violation-free sick leave history, and can document an objective finding of injury or illness.[2]

Officers otherwise out on sick leave are required to remain in their residences at all times except for "time out-of-residence authorized by HMD." Officers may log out at any time for medical appointments, hospital visits or physical therapy ordered by a physician. All other personal business, however, including civic, educational and religious duties, must be conducted during an officer's daily four-hour block of "rec" time. This is often difficult given that officers must designate either the 8:00 a.m.-12:00 p.m. block or the 1:00-5:00 p.m. block for a thirty day period; there is no evening option. HMD will only entertain individual requests for additional time out-of-residence "in the event of a dire emergency" and each such request is evaluated by the

2. On January 1, 1997, DOC instituted a pilot program which permits officers injured in the line of duty 24 hours out-of-residence for up to four months.

commanding officer of HMD or his designee on a case-by-case basis.

All officers subject to the in-residence rules are also subject to home visits by HMD staff between 9:00 a.m. and 10:00 p.m. According to the DOC, the purpose of home visitation is to "ensure compliance with Directive 2262, deter the abuse of sick leave benefits, evaluate medical conditions, and investigate officers suspected of feigning illness." An officer who is not at home when an unannounced visit is conducted may be penalized one month's salary.

* * * * * *

This case began with twelve consolidated actions filed in 1996 and 1997 by correction officers and captains subject to Directive 2262. According to the 223-page verified complaint in the *Almodovar* action, dated October 4, 1996, the home confinement provision of the sick leave policy is unconstitutional, facially and as applied, because it substantially impairs an officer's right to practice his or her religion, to vote, to travel, to freely associate, and to be free from bodily restraint. The following incidents capture the spirit of the hundreds of alleged constitutional deprivations: Michael Messina, injured during an altercation with an inmate, was denied extra time out-of-residence to attend church services, to vote in the Republican primary, and to visit his sister in the hospital; Tanya Mann, who suffered a job-related psychiatric problem, was denied extra time out-of-residence to attend the funerals of six members of her church, to attend Sunday services with her husband, the associate pastor, and to take her daughter to ballet class; Luis

Santiago, a veteran, was not permitted to participate in the Memorial Day parade; and Linda Varbero, injured when she slipped in a correction facility locker room, was denied permission to attend a hearing to determine her eligibility for social security. Individual plaintiffs also claim harassment, wrongful punishment, and disparate application of the sick leave policy, and challenge various procedures governing the classification and treatment of "sick leave abusers."

Plaintiffs and defendants filed cross-motions for summary judgment in December 1997. Defendants argued, inter alia, that the plaintiffs' claims were barred by res judicata in light of the court-approved stipulation in the *Seabrook* action; that plaintiffs had not submitted evidence that the policy had been applied unfairly or with an intent to harass; that the individual defendants were entitled to qualified immunity; and that any surviving claims should be transferred to Judge Block, who had approved the *Seabrook* stipulation. Plaintiffs argued that defendants waived the defense of res judicata when they failed to include it in ten of the twelve answers and filed the remaining two answers in an untimely manner. Even if the defense was allowed, plaintiffs argued, it failed on the merits because the cases involved different plaintiffs, different defendants, different incidents, and a different version of Directive 2262. Finally, plaintiffs asserted that summary judgment was inappropriate on the as-applied claims where there were genuine unresolved issues of material fact.

Oral argument was held on the motions on December 23, 1997, and the parties submitted additional memoranda.

Defendants responded that they had raised the res judicata defense in the *Almodovar* and *Ball* actions, which covered thirty of the forty plaintiffs, and that those answers had been filed with plaintiffs' consent. Defendants also asserted that plaintiffs' counsel was aware of the *Seabrook* settlement and should therefore be estopped from claiming prejudice. Plaintiffs argued that their consent to the late-filed answers was made without knowledge that they would contain new affirmative defenses. Moreover, the significant time and money expended by plaintiffs on depositions was sufficient to constitute unfair prejudice, they argued, especially where the defendants had failed to present a good cause explanation for the late assertion.

Judge Rakoff issued his decision July 7, 1998, granting defendants' motion for summary judgment and dismissing, with prejudice, the entire verified complaint. See *Monahan v. City of New York Dep't of Correction,* 10 F.Supp.2d 420 (S.D.N.Y.1998). The court permitted defendants to assert the res judicata defense in all twelve actions, concluding that plaintiffs had failed to demonstrate any "material prejudice." *Id.* at 423. On the merits, the court found that res judicata barred the plaintiffs' facial challenge to Directive 2262 because (1) the voluntary dismissal with prejudice of the claims in the *Seabrook* action constituted an adjudication on the merits; (2) plaintiffs were in privity with Norman Seabrook who brought the action in his capacity as president; and (3) plaintiffs' constitutional claims were, or could have been, raised in the *Seabrook* action. The court also concluded that most of plaintiffs' as-applied claims were "either sufficiently general or sufficiently inherent in a neutral application" of the amended sick leave policy that they too

were, or reasonably could have been, raised in the earlier action. *Id.* at 426.

The court held in the alternative that even if the constitutional claims were not barred by *res judicata,* the DOC policy would survive a rational basis review. *Id.* at 424-25. The court also held that the as-applied claims possessed insufficient factual support to overcome a motion for summary judgment. The court rejected plaintiffs' contention that it was "physically impossible . . . to review forty (40) deposition transcripts and set forth each allegation which represents a constitutional violation under a particular amendment in a forty (40) page memorandum," and held that plaintiffs had "utterly failed to meet their burden to set forth admissible evidence supporting these claims or otherwise demonstrating that a genuine issue of material fact exists for trial." *Id.* at 426 & n. 8. Final judgment was entered July 14, 1998.

II

Although *res judicata* is an affirmative defense that should be raised in the defendant's answer, the district court has the discretion to entertain the defense when it is raised in a motion for summary judgment, by construing the motion as one to amend the defendant's answer. *Block v. First Blood Assocs.,* 988 F.2d 344, 350 (2d Cir.1993). We review the district court's decision to grant a party leave to amend for abuse of discretion. *Tokio Marine and Fire Ins. Co. v. Employers Ins. of Wausau,* 786 F.2d 101, 103 (2d Cir.1986).

Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend a party's pleading "shall be freely given

when justice so requires." Fed.R.Civ.Proc. 15. The Rule reflects two of the most important principles behind the Federal Rules: pleadings are to serve the limited role of providing the opposing party with notice of the claim or defense to be litigated, see *Conley v. Gibson,* 355 U.S. 41, 47-48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), and "mere technicalities" should not prevent cases from being decided on the merits, see *Foman v. Davis,* 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). See also 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 1471 (2d ed.1990). Thus, absent evidence of undue delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party, or futility, Rule 15's mandate must be obeyed. *Foman,* 371 U.S. at 182, 83 S.Ct. 227.

The circumstances surrounding the untimely assertion of *res judicata* were clarified during oral argument before Judge Rakoff. After a personnel changeover in the Office of the Corporation Counsel, ten of the twelve cases were assigned to lawyers who had not worked on the *Seabrook* action and were unaware of the stipulation. Consequently, the answers they prepared and filed within the applicable deadlines did not include the affirmative defense.[3] In the other two cases, *Ball* and *Almodovar,* the attorney assigned to file the answers was transferred to another matter and, in the transition, none was filed. The omission was discovered by lead counsel after the *Seabrook* stipulation was brought to his attention. Corporation Counsel requested leave to file

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3. The officers point out on appeal that Assistant Corporation Counsel Martha Calhoun signed both the stipulation and the answer filed in the Monahan action.

the two remaining answers and plaintiffs waived any objection, apparently without knowledge that defendants would for the first time include the defense of claim preclusion. The two answers in *Ball* and *Almodovar*, covering 30 of the 40 individual plaintiffs, are dated November 12, 1997. Paragraphs 75 and 959, respectively, state that plaintiffs' "claims are barred, in whole or in part, by res judicata and collateral estoppel." The court characterized these events at oral argument as an "organizational snafu" and found no evidence of bad faith or dilatory motive on the part of the Corporation Counsel.

Thus, we are asked on appeal to consider whether plaintiffs were unduly prejudiced by the court's decision to allow the defense of res judicata to be asserted by defendants for the first time on summary judgment. In determining what constitutes "prejudice," we generally consider whether the assertion of the new claim or defense would "(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction." *Block*, 988 F.2d at 350. None of these three conditions is present in this action. The crux of appellants' argument, however, is that prejudice here comes in the form of misallocated resources. The officers contend that defendants' delay caused them to waste time and money deposing witnesses and preparing for a trial on the merits when they should have been focusing their discovery on issues of privity, the breadth of the *Seabrook* settlement, and the motivation of the "class representatives" in an effort to survive the charge of claim preclusion.

Appendix A

As the district court correctly noted, the fact that one party has spent time and money preparing for trial will usually not be deemed prejudice sufficient to warrant a deviation from the rule broadly allowing amendment to pleadings. See *Block*, 988 F.2d at 351. Rather, we will be most hesitant to allow amendment where doing so unfairly surprises the non-movant and impedes the fair prosecution of the claim. Thus, in *Block*, we permitted defendants to assert an affirmative defense in their motion for summary judgment four years after the complaint was filed because plaintiffs had knowledge of the facts giving rise to the defense. *Id.* at 350-511; see also *Han v. Mobil Oil Corp.*, 73 F.3d 872, 877-78 (9th Cir.1995) (fact that plaintiff had the information giving rise to the defense weighs against argument that plaintiff was prejudiced by the delay). The record indicates that plaintiffs' counsel, Leeds & Morelli, was well aware of the *Seabrook* stipulation.[4] The firm was retained by James Palozzolo in 1996 and filed an action on his behalf on January 3, 1997, to collect from COBA the attorneys' fees associated with prosecution of the suit referred to in the excised paragraph of the stipulation. Thus, even assuming that Leeds & Morelli only learned the details of the *Seabrook* settlement late in 1996, that is still twelve months before defendants' motion for summary judgment was filed on December 9, 1997. Defendants' untimely amendment did not unfairly surprise plaintiffs or impede the fair prosecution of their claims.

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4. At oral argument, counsel for plaintiffs admitted they had notice of the *Seabrook* action: "We knew about it? So what? We knew about it." The principles that governed our decision in *Evans v. Syracuse City School Dist.*, 704 F.2d 44 (2d Cir.1983), have no application here.

Appendix A

III

The doctrine of *res judicata,* or claim preclusion, holds that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."[5] *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Burgos v. Hopkins,* 14 F.3d 787, 789 (2d Cir.1994). "Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction of series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." *NLRB v. United Technologies Corp.,* 706 F.2d 1254, 1260 (2d Cir.1983) (citations omitted). To prove the affirmative defense a party must show that (1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action. *Allen,* 449 U.S. at 94, 101 S.Ct. 411; *Burgos,* 14 F.3d at 789; *Chase Manhattan Bank, N.A. v. Celotex Corp.,* 56 F.3d 343, 345-46 (2d Cir.1995).

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5. This is separate from the related doctrine of collateral estoppel, or issue preclusion, which "bars a party from relitigating in a second proceeding an issue of fact or law that was litigated and actually decided in a prior proceeding if that party had a full and fair opportunity to litigate the issue in the prior proceeding. . . ." *Metromedia Co. v. Fugazy,* 983 F.2d 350, 365 (2d Cir.1992), *cert. denied,* 508 U.S. 952, 113 S.Ct. 2445, 124 L.Ed.2d 662 (1993). Although both defenses were raised in the answers, the district court dismissed the action based on claim preclusion and it is that decision we now review.

Appendix A

On appeal, plaintiffs no longer contest that the settlement agreement is a final judgment on the merits. *See Greenberg v. Board of Governors of Fed. Reserve Sys.*, 968 F.2d 164. 168 (2d Cir.1992). Rather, the officers make three principal arguments that the *Seabrook* settlement cannot stand as a bar to this action; first, Norman Seabrook cannot be said to be in privity with the officers to the extent that he has waived their constitutional rights; second, the excised paragraph of the stipulation indicates that the parties presumed continued litigation over the Directive's constitutionality; and third, *res judicata* cannot bar as-applied claims that post-date the settlement. We consider each of these arguments in turn.

a. *Privity*

It is well-settled in this circuit that literal privity is not a requirement for *res judicata* to apply. *See, e.g., Chase Manhattan*, 56 F.3d at 346 ("Whether there is privity between a party against whom claim preclusion is asserted and a party to prior litigation is a functional inquiry in which the formalities of legal relationships provide clues but not solutions."). Instead, a party will be bound by the previous judgment if his "interests were adequately represented by another vested with the authority of representation." *Alpert's Newspaper Delivery, Inc. v. The New York Times Co.*, 876 F.2d 266, 270 (2d Cir.1989). This principle has been extended to preclude workers from challenging consent decrees entered into by their union. *See, e.g., United States v. International Bhd. of Teamsters*, 905 F.2d 610, 622-23 (2d Cir.1990) (holding that union official was bound by terms of disciplinary mechanism set in place by consent decree between the United States and union, notwithstanding fact

that official was not a party to original lawsuit nor signatory of consent decree); *United States v. International Bhd. of Teamsters,* 931 F.2d 177, 185-186 (2d Cir.1991) (concluding that IBT subordinate entities — members, locals, joint councils, and area conferences — were bound by consent decree even though they were nonparties to original action where union adequately represented the interests of the collective membership). It is clear that Norman Seabrook brought the earlier action in "his capacity as President of the Correction Officers' Benevolent Association" in an effort to protect the rights of COBA members subject to Directive 2262. Each plaintiff here belonged at all relevant times to COBA, the "sole and exclusive collective bargaining representative for the unit consisting of employees of New York City in the titles of Correction Officer. . . ." There is no evidence that individual union members sought to intervene in the first lawsuit or that Norman Seabrook was not authorized to proceed on their behalf. The second prerequisite for *res judicata* is present here.

Appellants contend, however, that they cannot be considered in privity with Norman Seabrook because he had no authority to waive their constitutional rights. They direct our attention to a series of cases insulating due process rights from state encroachment: *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); and *Vitek v. Jones,* 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). Those cases, they argue, read in conjunction with Justice Powell's declaration in *Abood v. Detroit Board of Education,* 431 U.S. 209, 253, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (Powell, J.,

concurring in judgment), that a collective-bargaining agreement to which a state is a party is "fully subject to the constraints that the Constitution imposes on coercive governmental regulation," establish that COBA may not waive its members' constitutional rights. Therefore, because Directive 2262 "substantially impairs" the officers' "fundamental constitutional rights," Norman Seabrook had no authority to sign the stipulation and it cannot be said that the interests of COBA members were "adequately represented." *See Alpert's,* 876 F.2d at 270.

The officers misconceive the *res judicata* inquiry. They ask us, in effect, to reevaluate the merits of the first action in order to assess the adequacy of their representation. The doctrine of *res judicata,* however, was established as a means to promote legal economy and certainty. *Expert Electric, Inc. v. Levine,* 554 F.2d 1227, 1232 (2d Cir.), *cert. denied,* 434 U.S. 903, 98 S.Ct. 300, 54 L.Ed.2d 190 (1977). The entry of a consent judgment has a preclusive effect not simply because it is an exercise of judicial power entitled to appropriate respect,[6] but because of the policy favoring finality of judgments. *Amalgamated Sugar Co. v. NL Industries, Inc.,* 825 F.2d 634, 639 (2d Cir.), *cert. denied,* 484 U.S. 992, 108 S.Ct. 511, 98 L.Ed.2d 511 (1987). As the Supreme Court explained a century ago,

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6. *See* 1B J. Moore, Moore's Federal Practice, ¶ 0.409(5), p. 1030 (2d ed. 1965) ("[A consent] judgment is not an *inter partes* contract; the court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication."), *cited in Kaspar Wire Works, Inc., v. Leco Eng'g and Machine, Inc.,* 575 F.2d 530, 538-39 (5th Cir.1978) (distinguishing consequences of consent decree for claim and issue preclusion).

> [E]nforcement of [*res judicata*] is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them.

Southern Pacific R. Co. v. United States, 168 U.S. 1, 48-49, 18 S.Ct. 18, 42 L.Ed. 355 (1897), *quoted in Teltronics Servs., Inc. v. L M Ericsson Telecomms., Inc.*, 642 F.2d 31, 36 n. 8 (2d Cir.), *cert. denied*, 450 U.S. 978, 101 S.Ct. 1511, 67 L.Ed.2d 813 (1981). Relitigating the constitutional propriety of Directive 2262 now would not only do a disservice to defendants, it would undermine the ability of labor associations to vindicate their members' rights in court.[7]

Loudermill and *Abood* may represent an exception[8] to the Supreme Court's general understanding that employees are bound by their union's decisions as *quid pro quo* for the benefit they receive from collective bargaining. *See United Mine Workers of America Health and Retirement Funds v.*

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7. Because we conclude that *res judicata* bars plaintiffs' facial challenge to the sick leave policy, we decline to review the district court's alternative holding that Directive 2262 should be evaluated under the "rational basis" test and that the policy is rationally related to the legitimate interests of the Department of Correction.

8. *See* Richard Wallace, Comment, *Union Waiver of Public Employees' Due Process Rights*, 8 Indus. Rel. L.J. 583, 596 (1986).

Robinson, 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982); *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325, 94 S.Ct. 1099, 39 L.Ed.2d 358 (1974); *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 455, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953). These latter cases rest on the notion that an individual employee's right to challenge the terms of a collective bargaining agreement must be limited if collective bargaining is to exist at all. This principle will only give way when the Constitution so requires,[9] when Congress has directed

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9. The due process cases cited by defendants stand for the proposition that "[C]ertain substantive rights — life, liberty, and property — cannot be deprived except pursuant to constitutionally adequate procedures. . . . 'While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.' " *Loudermill*, 470 U.S. at 541, 105 S.Ct. 1487 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (Powell, J., concurring in part and concurring in result in part)). Procedural due process rights are accorded special protection because they belong to that special category of rights first described in Justice Stone's famous footnote 4, namely those that are necessary to protect all other rights from encroachment by a more powerful majority. *United States v. Carolene Prods. Co*, 304 U.S. 144, 153 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938).

The allegation, however, that the officers' procedural due process rights, *i.e.* those implicated by an application of the sick leave policy, were not adequately protected by the prior litigation is insufficient to bar the application of *res judicata*. *See, e.g., Jones v. Texas Tech University*, 656 F.2d 1137 (5th Cir.1981) (consent

(Cont'd)

otherwise,[10] or when a contrary result would unravel collective bargaining altogether. Thus, in *Metropolitan Edison v. NLRB*, 460 U.S. 693, 103 S.Ct. 1467, 75 L.Ed.2d 387 (1983), the Court held that "a union may bargain away its members' economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative." *Id.* at 705-706, 103 S.Ct. 1467, *citing Magnavox*, 415 U.S. at 325, 94 S.Ct. 1099 (union cannot waive employee's right to strike against unfair labor practices).

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judgment in prior action by plaintiff alleging, in both representational and individual capacities, that university officials deprived plaintiff and other members of student organization of their rights to freedom of speech and due process of law barred second suit on *res judicata* grounds where second action alleged that procedures pursuant to which he was placed on probation and restricted from campus leadership activities violated his individual due process rights); *Sanders v. United States*, 34 Fed.Cl. 38 (Fed.Cl.1995); *Multi-State Communications, Inc. v. United States*, 648 F.Supp. 1203 (S.D.N.Y.1986).

10. *See Robinson*, 455 U.S. at 575, 102 S.Ct. 1226 (citing *Franks v. Bowman Transp. Co. Inc.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (terms of collective bargaining agreement must comply with Title VII); *Corning Glass Works v. Brennan*, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974) (Equal Pay Act); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946); *Norfolk & Western R. Co. v. Nemitz*, 404 U.S. 37, 92 S.Ct. 185, 30 L.Ed.2d 198 (1971) (Interstate Commerce Act)).

Similarly, the Supreme Court has recognized that individual workers benefit when their union litigates on their behalf. *International Union, United Auto., Aerospace, and Agric. Implement Workers of America [UAW] v. Brock*, 477 U.S. 274, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986). "[A]n association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital. Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack." *Id.* at 289, 106 S.Ct. 2523 (citation and internal quotation marks omitted). These "special features, advantageous both to the individuals represented and to the judicial system as a whole[,]" justify the potential cost of preclusion imposed on individual members. *Id.* Holding in *Brock* that the UAW had associational standing to challenge a policy directive issued by the Secretary of Labor, the Court answered concerns that individual workers would not be protected by the procedural safeguards associated with formal class certification under Rule 23 of the Federal Rules of Civil Procedure. Should the evidence show an association was unable to "represent adequately the interests of all [its] injured members . . . a judgment won against it might not preclude subsequent claims by the association's members without offending due process principles." *Id.* at 290, 106 S.Ct. 2523.

Norman Seabrook was freely chosen to be the authorized bargaining representative for COBA members in 1996. He challenged Directive 2262 in court on grounds virtually identical to those underlying this action and brought the action in his capacity as president of the union for the benefit

of the members.[11] Absent evidence of collusion between Seabrook and the DOC,[12] plaintiffs are now bound to accept the amended sick leave policy to which he agreed.

b. *The Significance of the Excised Paragraph*

The officers argue that "A careful reading of the Stipulation reveals that the parties who signed it did not intend to bar future challenges to the constitutionality — facial and as-applied — of the sick leave policy." They rest this claim not on the text, but on language ostensibly omitted from the agreement. First, they note the absence of any language specifically precluding future constitutional

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11. The *Seabrook* complaint, for example, alleged that two plaintiffs seriously injured in the line of duty were denied leave from their residence to attend church service, to pick up a paycheck, or to take children to school. It further averred that "Norman Seabrook . . . through his office logged in excess of 150 complaints of a similar type by correction officers who were denied leave from their residence to attend religious services." The complaint alleged that defendants conspired to deprive plaintiffs of their First Amendment rights in violation of 42 U.S.C. § 1985. The *Seabrook* plaintiffs not only sought a judgment declaring Directive 2262 as unconstitutional on its face, but also requested an injunction barring defendants and their successors from "subjecting correction officers entitled to sick leave to unlawful violation of their First Amendment freedoms and . . . an appropriate remedy to the aforesaid abuse of discretion."

12. We could imagine a different result if it appeared that union leadership and management sought to use litigation and a consent decree to take an issue off the bargaining table against the best interests of a particular class of current or future employees.

challenges to Directive 2262 and, second, they point to the parties' decision to strike paragraph "4" from the document.[13]

With respect to the claimed omission, we note that there *is* clear language in the document indicating the parties' desire for finality: "Whereas, the parties now desire to resolve the issues arising from this litigation without further proceedings." The stipulation calls for dismissal of the action "with prejudice" so long as the defendants agreed to amend Directive 2262. For the very reasons discussed in this opinion, the parties could presume from this language that subsequent constitutional challenges to Directive 2262 (by Seabrook, by COBA, and by union members whose interests were represented in the prior proceeding) would be precluded. Finally, the parties provided the appropriate procedures to contest subsequent amendments to Directive 2262 by establishing notice requirements, ensuring that Judge Block retained jurisdiction, and clarifying that either party may move to reopen the matter.

With respect to the excision of Paragraph 4, we can only surmise that initially the two pending actions were to be exempted from the stipulation. We see no evidence that this

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13. Paragraph 4 provided in its entirety:

> The parties agree that the amendment of Section VII of Directive 2262, annexed hereto as Exhibit "A" also resolves all issues of declaratory and injunctive relief sought in the companion cases of *Ball v. Sielaff, et al.*, 90 Civ. 4456(FB), and *Palozzolo v. Abate, et al.*, 92 Civ. 3305(FB), and those claims for relief are also hereby dismissed with prejudice and without costs.

plan was altered because "it was clear to all parties that the constitutionality of the sick leave policy would continue to be litigated in the future."

c. *Identity of Claims*

Plaintiffs' third argument concerns whether there is a sufficient identity of claims to support a finding of *res judicata*. "Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." *United Technologies*, 706 F.2d at 1260. The officers begin by pointing out that the *Seabrook* stipulation resulted in a *revised* sick leave policy. Thus, they argue, *res judicata* cannot bar any challenge to the version of the policy in place after the signing of the stipulation on April 9, 1996 because it is not the same, *i.e.*, identical, policy challenged by the *Seabrook* complaint. This semantic cartwheel would virtually eliminate the doctrine of *res judicata* for a significant subset of those claims resolved by settlement agreement. Parties would have no incentive to modify a controversial policy if the amended version was subject to renewed attack. The efficiencies created by a mutually agreeable settlement would be lost.

There is ample precedent to show that mere modification of a challenged policy will not alone undo the preclusive effect of a former judgment. In *Nash v. Bowen*, 869 F.2d 675, 679 (2d Cir.), *cert. denied*, 493 U.S. 812, 110 S.Ct. 59, 107 L.Ed.2d 27 (1989), for example, we held that *res judicata*

precluded a challenge by an administrative law judge to new procedural rules because his claim was "substantially identical" to one brought four years earlier by the Association of ALJs, of which he was a member. We reached this result even though the Association's claim concerned a distinct (and discontinued) program. We concluded that "the 'Bellmon Review Program' [was] for all intents and purposes the same as the 'Quality Assurance System' " to which Nash now objected, and, therefore, his claims were either raised in the Association case or "could have been raised" in that action. *Id.* The two versions of Directive 2262 have an even greater affinity.

Plaintiffs' assertion of new incidents arising from the application of the challenged policy is also insufficient to barthe application of *res judicata*. *See Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 638 (2d Cir.1989) (holding prior dismissal of civil rights claims precluded whistle blower's subsequent RICO action despite allegations of new acts of harassment); *Waldman v. Village of Kiryas Joel*, 39 F.Supp.2d 370, 379 (S.D.N.Y.1999) (concluding *res judicata* barred resident's Establishment Clause claims even though complaint relied on facts that post-dated prior judgments), *aff'd*, 207 F.3d 105 (2d Cir.2000). We look to see "whether the same transaction or *connected series of transactions* is at issue." *United Technologies*, 706 F.2d at 1260 (emphasis added); *Brooks v. Giuliani*, 84 F.3d 1454, 1463 (2d Cir.1996) (applying New York law) (rejecting argument that state conduct post-dating prior action was not part of same transaction or series of transactions). " 'Transaction' must be given a flexible, common-sense construction that recognizes the reality of the situation."

See Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 91 (2d Cir.1997). The hundreds of new incidents about which plaintiffs now complain fall within the same queue as those of injured officers who sought additional time out-of-residence under the earlier version.

Plaintiffs cannot elude this reality merely by invoking legal terms of art with constitutional mystique. *See Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319, 1323 (10th Cir.1998). Where all requirements are met, *res judicata* can act as a bar to virtually any sort of claim, including constitutional challenges to the facial validity of municipal regulations. *See, e.g., Irish Lesbian and Gay Org. v. Giuliani*, 143 F.3d 638, 646 (2d Cir.1998) (barring organization's free speech and equal protection challenges to the facial validity of ordinance and accompanying interpretive police department regulations on the grounds that such claim had been, or could have been, litigated in previous action). The "as applied" label cannot obscure the fact that new time out-of-residence denials are part of the same series of transactions. If the new as-applied challenges are to aspects of the policy which survive the earlier litigation, then the claim itself was subsumed by the earlier litigation. *See Nash*, 869 F.2d at 679. If the as-applied challenges arise from new provisions of the policy to which an authorized representative has agreed, the members are bound by their representative's decision. *See Teamsters*, 931 F.2d at 184-185; *Teamsters*, 905 F.2d at 622.

This is not to say that Directive 2262 is forever immune from attack. *Res judicata* and collateral estoppel do not cement the *status quo* into perpetuity. "[M]odifications in

'controlling legal principles' could render a previous determination inconsistent with prevailing doctrine," *Montana,* 440 U.S. at 161, 99 S.Ct. 970 (quoting *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591, 599, 68 S.Ct. 715, 92 L.Ed. 898 (1948)), and changed circumstances may sufficiently alter the factual predicate such that new as-applied claims would not be barred by the original judgment. Claims based on conduct or procedures which were not contemplated by, or a direct result of, the earlier action would not necessarily be precluded. If it was clear, for example, that all Catholics were now being denied religious exemptions, while all Muslims were granted extra rec time, it is unlikely that the Catholic's claim under § 1983 would be barred by the *Seabrook* settlement. Likewise, a new administration might interpret and apply a particular provision in a manner not countenanced by either party to the settlement, in which case litigation might be permitted in order to interpret the scope or text of the consent decree. *See Teamsters,* 931 F.2d at 182-183 & n. 1 (explaining that terms of complex consent decree often require ongoing interpretation and interlocutory review). The parties contemplated that further court action before Judge Block might be necessary and thus memorialized the court's continuing jurisdiction over the matter. The Federal Rules set forth additional procedures for a party interested in modifying a consent decree[14]

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14. The Supreme Court discussed the relevant burdens of proof in *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992):

> A party seeking modification of a consent decree [under Fed.R.Civ.Proc. 60(b)] may meet its initial burden by

(Cont'd)

and there are, moreover, any number of extra-judicial procedures with which the officers may address an untenable sick leave policy.[15]

IV

Having concluded that *res judicata* barred the officers' facial challenge to Directive 2262, the district court found that most of plaintiffs' individual "as-applied" claims were "sufficiently general or sufficiently inherent in a neutral application of amended Directive 2262 that they reasonably

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(Cont'd)

> showing either a significant change in factual conditions or in law. Modification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous. . . . Ordinarily, however, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree. If it is clear that a party anticipated changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b).

Id. at 384-85, 112 S.Ct. 748.

15. Officers dissatisfied with the outcome of the prior action may choose to oust union leaders responsible for the settlement, reject future agreements that include adherence to Directive 2262, or seek a legislative solution.

could have been raised, or, in some cases, were in fact raised in *Seabrook* and are consequently barred by res judicata." *Monahan,* 10 F.Supp.2d at 426. With respect to the remaining claims of harassment, wrongful punishment, disparate application of the sick leave policy, conspiracy, and discrimination on the basis of a disability, the court found that plaintiffs had "utterly failed to meet their burden to set forth admissible evidence supporting these claims or otherwise demonstrating that a genuine issue of material fact exists for trial with respect to these claims."[16] *Id.* Plaintiffs had complained it was " 'unfair' for them to be required to sift through the relevant deposition transcripts to find evidence supporting each of their claims" and that the page limits governing their memorandum in opposition to defendants' motion for summary judgment made it impossible to "set forth each allegation which represents a constitutional violation." *Id.* (quoting plaintiffs' opposition brief at 19-20). The district court pointed out that the appropriate place to "set forth" each allegation was in

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16. To defeat the defendants' summary judgment motion, the officers were required to make a showing sufficient to establish the existence of elements essential to their case, and on which they would bear the burden of proof at trial. *Citizens Bank of Clearwater v. Hunt,* 927 F.2d 707, 710 (2d Cir.1991) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)); *see also Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.,* 902 F.2d 174, 177-78 (2d Cir.1990) ("The non-movant . . . , who must sustain the ultimate burden of proof, must demonstrate in opposing a summary judgment motion that there is some evidence which would create a genuine issue of material fact."), *cert. denied,* 500 U.S. 928, 111 S.Ct. 2041, 114 L.Ed.2d 125 (1991).

plaintiffs' statement pursuant to Local Rule 56.1,[17] but their counter-statement was, nevertheless, "utterly bereft of record citations relating to the particulars of any of plaintiffs' claims of as-applied unconstitutionality." 10 F.Supp.2d at 426 & n. 8 (citing *Riley v. Town of Bethlehem,* 5 F.Supp.2d 92 (N.D.N.Y.1998) (denying motion for summary judgment for failure to supply record citations supporting statement of material facts); *Union Carbide Corp. v. Montell N.V.,* 179 F.R.D. 425 (S.D.N.Y.1998)). Accordingly, the district court granted the defendants' motion for summary judgment on all remaining claims.

On appeal, the officers do not specifically address the material elements of any of the as-applied claims. They do

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17. Local Civil Rule 56.1 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York governs "Statements of Material Facts on Motion for Summary Judgment." It provides in relevant part that

> (b) The party opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.
>
> (c) All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.
>
> (d) Each statement of material fact by a movant or opponent must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e).

not appeal the grant of summary judgment on the claims of harassment, wrongful punishment, conspiracy, disparate application, or discrimination on the basis of a disability. Instead, the officers argue that the district court erred when it failed to consider their verified complaints[18] as admissible evidence in support of their claims that the sick leave policy "precluded Plaintiffs-appellants from engaging in constitutionally protected activities." Having reviewed plaintiffs' submissions to the lower court as well as the list of citations to the verified complaints provided for the first time on appeal, we agree with appellees that the district court

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18. The "Almodovar" verified complaint, sworn by eleven of the 40 plaintiffs is 223 pages and 958 paragraphs long. It contains a mixture of factual allegations and legal conclusions. Count One charges that the policy is facially unconstitutional and that defendants lack sufficient guidelines for discretionary decisions regarding time out-of-residence requests. Counts Two through Thirty set forth the particular details of each plaintiff's experience with Directive 2262 and conclude with the identical allegation that "Directive 2262 is unconstitutional as applied to plaintiffs in that it is and has been applied in a willful and malicious manner by defendants with an intent to harass or intimidate plaintiff and deprive him [or 'her'] of his [or 'her'] fundamental constitutional rights." *See, e.g.*, Almodovar cplt. ¶¶ 87, 127, 167, 211, 235, 295, 326, 361, 388, 425, 461, 483, 517, 537, 557, 591, 626, 660, 680, 708, 728, 764, 783, 807, 845, 874, 895, 912, and 946. Count Thirty-one alleges a conspiracy to deprive plaintiffs of their constitutional rights in violation of 42 U.S.C. § 1985. Count Thirty-two alleges that plaintiffs were denied benefits and privileges as a result of their classification as sick-leave abusers. Eleven other substantially-similar actions, each initiated by a verified complaint, were consolidated with the Almodovar action on March 14, 1997. Plaintiff Lorde alone included a claim of disability discrimination under New York state law.

appropriately dismissed all of the remaining as-applied claims alleging deprivation of constitutional liberties.

It is true that a verified complaint may serve as an affidavit for summary judgment purposes provided it meets the other requirements for an affidavit under Rule 56(e). *Colon v. Coughlin,* 58 F.3d 865, 872 (2d Cir.1995) (noting that Fed.R.Civ.Proc. 56(e) requires affidavits to be made on personal knowledge, to set forth facts that would be admissible in evidence, and to demonstrate the affiant's competency to testify to the matters in the affidavit); 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1339, at 152 (1990).

This does not mean, however, that parties opting to file a verified complaint earn a special pass to avoid Local Rule 56.1. A district court has the discretion to adopt local rules that are necessary to carry out the conduct of its business. *Frazier v. Heebe,* 482 U.S. 641, 645, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987) (citing 28 U.S.C. §§ 1654, 2071; Fed.R.Civ.Proc. 83). In the Southern and Eastern Districts of New York, a party opposing a motion for summary judgment *shall* file a short and concise statement of the material facts in dispute accompanied by citation to evidence which would be admissible. L.R. 56.1(b) and (d). Local Rule 56.1 is designed to place the responsibility on the parties to clarify the elements of the substantive law which remain at issue because they turn on contested facts. *Cf. Lawler v. Jacobs Eng'g Group of Ohio, Inc.,* 25 F.3d 1053 (7th Cir.1994) (table) (affirming grant of summary judgment after failure to comply with S.D.Ind.L.R. 56.1). "While the trial court has discretion to conduct an assiduous

review of the record in an effort to weigh the propriety of granting a summary judgment motion, it is not required to consider what the parties fail to point out." *Downes v. Beach,* 587 F.2d 469, 472 (10th Cir.1978); *see also Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 923 n. 4 (7th Cir.1994) (affording district court "considerable discretion" in applying its local rules); *Hernandez v. George,* 793 F.2d 264, 269 (10th Cir.1986) (same).

Here, however, even a *de novo* review of the record guided by the citations in the appellate brief provides no help for the officers because plaintiffs' as-applied claims regarding the right to participate in "constitutionally protected activities" fail to survive the initial *res judicata* evaluation. As discussed above, the mere assertion of new incidents arising from the application of the challenged policy is insufficient to bar the application of *res judicata. See Norman v. Niagara Mohawk Power Corp.,* 873 F.2d 634, 638 (2d Cir.1989); *Waldman v. Village of Kiryas Joel,* 39 F.Supp.2d 370, 379 (S.D.N.Y.1999), *aff'd,* 207 F.3d 105 (2d. Cir.2000). Most of the incidents cited in plaintiffs' appellate brief, however, are part of the "same transaction or connected series of transactions" at issue in the *Seabrook* litigation. *See United Technologies,* 706 F.2d at 1260. The *Seabrook* complaint alleged that two plaintiffs seriously injured in the line of duty were denied leave to attend church service, to pick up a paycheck, and to take children to school. Indicating that these claims were meant to be representative of a series of unconstitutional denials, the complaint states that "Norman Seabrook . . . through his office logged in excess of 150 complaints of a similar type by correction officers who were denied leave from their residence to attend

religious services." The series continues with events complained of here. Appellants direct our attention, for example, to paragraphs in the Almodovar complaint alleging that Irwin Cohen was denied permission to attend Saturday morning Sabbath services at his temple; that Michael Messina was forced to pick up his pay check during his rec time; and that plaintiff Alice Bresloff was unable to take her children to church services required by their parochial school. Most of the cited paragraphs identify occasions on which officers were denied additional time beyond their four recreation hours to participate in religious programs or attend religious services, to participate in family activities or attend to the needs of family members, to travel, to attend organizational meetings or celebrations, to vote, to attend funerals or weddings, or to make trips to the pharmacy. A number of the cited paragraphs recount penalties given to officers who did not answer the door during a surveillance visit because they were in the shower or across the street at a birthday party. It is clear that these incidents fall within "the same transaction or series of transactions" at issue in the *Seabrook* litigation. Other than new particular details, "the facts essential to the second were present in the first." *United Technologies,* 706 F.2d at 1260.

There are a few anomalous allegations. Several plaintiffs state that they were ordered back to work too soon or assigned to duties inappropriate to their medical condition. Others claim that the Department failed to accommodate their disability by failing to provide a handicapped parking space or a motorized vehicle. An employer's duty to accommodate physical disabilities, however, is grounded in state and

federal statutes and not the United States Constitution.[19] These allegations do not serve to make Directive 2262 unconstitutional as applied to individual circumstances. To the extent that these facts suggest a pattern or practice of harassment, plaintiffs have chosen not to appeal the district court's grant of summary judgment on those claims.

Affirmed.

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19. *See, e.g.*, the Americans with Disabilities Act of 1990 (ADA), Pub.L. 101-336, 104 Stat. 327, and analogous state statutes.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JULY 7, 1998

Daniel MONAHAN, et al.,

Plaintiffs,

v.

CITY OF NEW YORK DEPARTMENT OF CORRECTION, The City of New York, Michael Jacobson, Acting Commissioner, City of New York Department of Correction, Terance Skinner, Deputy Warden and Commanding Officer of the Health Management Division of the City of New York Department of Correction, and _____ Johnson, Supervisor Civilian (ID No.25835), et al.,

Defendants.

Nos. 96 Civ. 2287(JSR), 96 Civ. 3733(JSR), 96 Civ. 4224(JSR), 96 Civ. 7107(JSR), 96 Civ. 7108(JSR), 96 Civ. 8016(JSR), 96 Civ. 8140(JSR), 96 Civ. 9395(JSR), 96 Civ. 9719(JSR), 97 Civ. 0020(JSR), 97 Civ. 0649(JSR) and 97 Civ. 1670(JSR).

United States District Court,
S.D. New York.

July 7, 1998.

* * *

Appendix B

OPINION AND ORDER

RAKOFF, District Judge.

The plaintiffs in these twelve consolidated cases are current and former New York City correction officers who belonged at all relevant times to the Correction Officers' Benevolent Association ("COBA"), the exclusive bargaining agent for New York City correction officers. In 1995, their representative, Norman Seabrook, in his capacity as president of COBA, brought suit against the City of New York and related defendants challenging the constitutionality of the City's sick leave policy applicable to correction officers. *See Seabrook v. Jacobson*, No. 95 Civ. 4194(FB) (E.D.N.Y., Compl. dated Oct. 13, 1995) (the "*Seabrook*" action). That policy, as embodied in Department of Correction Directive 2262, permitted unlimited sick leave for up to a full year provided a correction officer on sick leave generally remained at home. While the City believed that the stay-at-home requirement was necessary to prevent its otherwise liberal leave policy from degenerating into an open invitation to fraud, the correction officers, as represented by Seabrook, argued that it deprived the officers of a wide variety of substantive and procedural rights guaranteed to them by the United States Constitution.

In April 1996, the *Seabrook* action was settled, pursuant to which an order was entered in federal court dismissing Seabrook's claims with prejudice. *See* Declaration of John F. Wirenius, dated November 20, 1997, Ex. E. Under the settlement, Directive 2262 was amended in numerous material respects. Among other things, correction officers

on sick leave (with certain limited exceptions known as "sick leave abusers") were no longer required to remain in their residences during their first eight sick days in a given calendar year; officers injured in the line of duty who were scheduled to return to work within two weeks of the injury were not required to remain in their residences at all; officers injured on duty but without a specific return date could apply to the Health Management Division for permission not to be confined to their residences during some or all of their period of leave; and all other officers on sick leave were permitted to leave their residences at any time for medical appointments and for an additional uninterrupted period of up to four hours per day for any other purpose whatever ("recreational time"). While officers in the latter category had to select which of two four-hour time slots (one in the morning, one in the evening) they would utilize for such recreational time (so as to enable Department of Corrections "home visit captains" to check on them), they could change the selection every 30 days.

The ink was hardly dry on this settlement when plaintiffs commenced the instant actions, challenging the amended Directive as facially violative of the First, Fourth, Fifth and Fourteenth Amendments of the Constitution and further contending that, in any event, the Directive has been unconstitutionally applied to them individually.[1] In effect they seek a third bite at the proverbial apple, since the sick

1. Some plaintiffs also allege that defendants engaged in a conspiracy to deprive them of equal protection and of their privileges and immunities, in violation of 42 U.S.C. § 1985(3). One plaintiff, Lorde, also alleges discrimination on the grounds of disability in violation of state (but not federal) law.

leave policy challenged in the *Seabrook* action was itself the result of collective bargaining. The Court concludes, however, that they may no longer feed on this fruit, since as explained below, their claims are not only barred by principles of res judicata but also are both legally and factually deficient. Accordingly, defendants' pending motion for summary judgment must be granted and plaintiffs' claims dismissed.

As noted, plaintiffs' first claim is that the sick leave policy arising from the *Seabrook* settlement, as embodied in amended Directive 2262, is unconstitutional on its face. To begin with, this claim is barred by the doctrine of res judicata. While it is true that defendants previously failed to plead this affirmative defense in all but two of the instant actions[2] and did not seek to amend the other pleadings to include this defense until filing for summary judgment, "absent prejudice to the plaintiff, a defendant may raise an affirmative defense in a motion for summary judgment for the first time." *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F.Supp. 706, 715 (S.D.N.Y.1987) (quoting *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir.1984)); *see also Block v. First Blood Assoc.*, 988 F.2d 344, 350 (2d Cir.1993); *Devito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F.Supp. 258, 263 (S.D.N.Y.1997); *United States v. Krieger*, 773 F.Supp. 580, 583 (S.D.N.Y.1991). Although plaintiffs allege prejudice, chiefly in having to expend substantial time and effort on

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2. However, in those two actions, *Almodovar* and *Ball* (involving 30 of the 40 plaintiffs), the answers embodying the res judicata defense, though otherwise untimely, were filed with plaintiffs' consent shortly before service of defendants' summary judgment motion.

discovery that they claim would have been improvident if they had known their claims were subject to being barred by res judicata, it is settled that "the time, effort and money . . . expended in litigating" a matter does not constitute "prejudice" for this purpose. *Block,* 988 F.2d at 351. Moreover, substantially the only discovery taken by plaintiffs over the entirety of these 12 cases consisted of deposing two witnesses. (Defendants, for their part, simply deposed the various plaintiffs.) This hardly constitutes material prejudice.

Nor, upon careful inspection of the record, do plaintiffs' other claims of prejudice find meaningful support. Conversely, even if plaintiffs' claims of prejudice were more colorable than they in fact are, on no analysis are they sufficiently substantial to overcome the "strong public policy in economizing the use of judicial resources" that, in appropriate cases, even warrants a court in raising the defense of res judicata *sua sponte*. *Doe v. Pfrommer,* 148 F.3d 73, 79-80 (2d Cir.1998); *see also Salahuddin v. Jones,* 992 F.2d 447, 449 (2d Cir.1993). Accordingly, defendants' application for leave to amend their answers in the other ten actions to assert the res judicata defense already raised in *Almodovar* and *Ball* is hereby granted.

Once raised, res judicata fully disposes of plaintiffs' claim of facial unconstitutionality. "Res judicata assures the finality of judgments by precluding a party to a lawsuit from litigating a claim more than once." *Chase Manhattan Bank, N.A. v. Celotex Corp.,* 56 F.3d 343, 345 (2d Cir.1995). "Res judicata may also preclude claims by parties who were not involved in the earlier lawsuit . . . when the precluded party's interests [were] represented" in that lawsuit. *Id.* The

doctrine takes effect when (1) there exists an adjudication on the merits in a prior lawsuit, (2) the prior lawsuit involved the party to be precluded or a party in privity with that party, and (3) the claims sought to be precluded were raised, or might reasonably have been raised, in the prior lawsuit. *See id.*

All three of these requirements are met here. The voluntary dismissal of the *Seabrook* claims with prejudice constitutes an adjudication on the merits. *See Chase Manhattan,* 56 F.3d at 345. Privity is established because the plaintiff in the *Seabrook* case brought that action "in his capacity as President" of the union that represented all of the instant plaintiffs in connection with the very issues here raised: he and they were thus in privity as a formal matter, as a practical matter, and as a matter of the identity of interests between those involved in *Seabrook* and those involved in the instant actions. *See id.*; *see also Nash v. Bowen,* 869 F.2d 675, 679 (2d Cir.1989) (judgment rendered against an association may serve as res judicata with respect to claims later asserted by members of that association). Finally, as to identity of claims, res judicata bars not only the instant claims under the First and Fourteenth Amendment (alleging violation of plaintiffs' rights to freely associate, vote, practice religion and exercise freedom of speech), which were expressly raised in *Seabrook,* but also the closely-related Fourth and Fifth Amendment claims (alleging that home confinement constituted an unreasonable search and seizure and violated plaintiffs' rights to privacy and due process), which reasonably could have been raised in the earlier proceeding. *See id.*

Accordingly, for the foregoing reasons, all of plaintiffs' claims of facial unconstitutionality are barred by res judicata and must be dismissed on that ground. Separately and independently, for the reasons that follow, they must also be dismissed on the independent ground that they cannot survive summary judgment on the merits.

Challenges to the facial constitutionality of regulations such as amended Directive 2262 are assessed under the "rational basis" test. Specifically, because of the multitude of legitimate interests that a government has in regulating conduct of its own agents and employees, the facial constitutionality of municipal regulations relating to municipal employees is usually satisfied if the municipal government can show a rational relationship between the challenged regulation and the state interest it is claimed to foster. *See Kelley v. Johnson,* 425 U.S. 238, 245, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976); *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). While there may be unusual situations where a regulation's potential chilling effect on the exercise of a constitutional right may require strict scrutiny of even a facial challenge, *see, e.g., Burson v. Freeman,* 504 U.S. 191, 198, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992), no such situation is here presented.[3]

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3. To the extent that *Pienta v. Village of Schaumburg,* 710 F.2d 1258 (7th Cir.1983), suggests otherwise, this Court, like the other courts to consider the issue, finds it completely unpersuasive. *See, e.g., Crain v. Bd. of Police Commissioners,* 920 F.2d 1402 (8th Cir.1990); *Uryevick v. Rozzi,* 751 F.Supp. 1064 (E.D.N.Y.1990); *Voorhees v. Shuli,* 686 F.Supp. 389 (E.D.N.Y.1987); *Philadelphia*

(Cont'd)

Appendix B

To meet the "rational basis" standard, defendants have provided unrebutted evidence that the modified home confinement aspects of Directive 2262 here challenged rationally serve the legitimate state interests of verifying officers' illnesses and preventing malingering. *See, e.g.*, Affidavit of Terrence Skinner, dated November 20, 1997, at 8-10, 16-18. As defendants' evidence shows, it is perfectly rational for a state employer, as part of a negotiated bargain by which it agrees to compensate for up to a full year an employee who professes to be too sick to even come to work, to condition such payment on the employee's effectively establishing the truth of his professions by remaining at home for most (but far from all) of the day unless he is sufficiently well to have already scheduled a return to work.

In response, plaintiffs, for all the myriad claims of facial unconstitutionality alleged in their Complaint, are reduced to arguing on this motion that the modified home confinement policies set forth in amended Directive 2262 are facially unconstitutional because, in the absence of more specific guidelines for their implementation, they must inherently operate in an arbitrary fashion. Defendants, for their part, contend that further guidelines exist, but fail to

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Lodge No. 5, FOP v. City of Philadelphia, 599 F.Supp. 254 (E.D.Pa.1984); *Loughran v. Codd,* 432 F.Supp. 259 (E.D.N.Y.1976); *see also Hambsch v. Dept. of Treasury,* 796 F.2d 430 (Fed.Cir.1986) (rational basis standard applied to secret service sick leave regulations); *Korenyi v. Dept. of Sanitation,* 699 F.Supp. 388 (E.D.N.Y.1988) (rational basis standard applied to sanitation department sick leave regulations).

provide admissible evidence to support this contention.[4] No further guidelines are necessary, however, because amended Directive 2262 itself provides sufficient guidance to pass constitutional muster.

A regulation is not rendered unconstitutional simply because its implementation requires the exercise of substantial discretion, unless such exercise presents an unreasonable potential for arbitrary denial of a constitutional right. In the sick leave cases on which plaintiffs here rely, *Uryevick v. Rozzi,* 751 F.Supp. 1064 (E.D.N.Y.1990), and *Voorhees v. Shull,* 686 F.Supp. 389 (E.D.N.Y.1987), this potential arose because unfettered discretion was delegated to administrators to provide undefined deviations from otherwise highly restrictive home confinement policies. In *Voorhees,* for example, the regulations at issue mandated that officers on sick leave could never leave their residences at all unless supervisors, on unspecified grounds, granted them permission. *Voorhees,* 686 F.Supp. at 390 & n. 1. Similarly, in *Uryevick,* the regulations required a sick police officer never to leave his residence between 9:00 a.m. and

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4. Exhibit H to the Wirenius Declaration, on which defendants purport to rely in this regard, is a document entitled "Computer System Medical Diagnosis Code, Health Management Division, Central Sick Desk," that on its face does not appear to create any meaningful guidelines. Moreover, both Deputy Warden Skinner and Deputy Warden Bird conceded at their depositions that no further guidelines exist. *See, e.g.,* Affidavit of Julie Knowles Johnson, dated November 20, 1997 ("Knowles Johnson Aff."), Ex. R, Skinner Dep. at 101 ("the specific guidelines were Directive 2262, period. Everything else was case by case[.]"); *id.* Ex. S, Bird Dep. at 83-84 (no other specific guidelines).

5:00 p.m. unless a Desk Officer determined that his absence could be allowed "for a reasonable purpose and time." *Uryevick,* 751 F.Supp. at 1066.

Here, by contrast, the extent and duration of the home confinement is much less restrictive, and the permitted exceptions more readily available and better defined, than in either *Voorhees* or *Uryevick.* Under the amendments to Directive 2262 that plaintiffs' union negotiated, sick police officers are not required to remain in their residences at any time during their first eight sick days of a given year, nor are officers injured in the line of duty with a definite return-to-duty date subject to any confinement. Those officers suffering longer-term illnesses that prevent them from returning to work, while required to remain in their residences for most of the day, can leave for up to four hours each day for any reason and can also leave at any time for medical appointments. This is not significantly different from the "confinement" they would suffer while working their ordinary eight-hour workdays as corrections officers — except, of course, that here they are being paid without having to work.

In short, amended Directive 2262 serves a rational purpose on its face, and is neither so restrictive nor so lacking in standards for its implementation as to create an undue risk of inherently arbitrary operation. To be sure, the Directive still leaves certain small decisions to the employer's discretion, such as certain adjustments to recreational time; but leaving such modest adjustments to the exercise of discretion can hardly be deemed irrational or arbitrary. If discretion cannot be exercised in such a small

compass, no room will ever be left for fact-specific determinations and the law will become unbending and inequitable.

Accordingly, in addition to being barred by principles of res judicata, plaintiffs' facial challenges to the constitutionality of Directive 2262 must be dismissed on the merits.

As mentioned, plaintiffs also claim that the amended Directive is unconstitutional as applied to them individually. For example, several plaintiffs assert that application of the Directive prevented them from taking part in various leisure and social activities, religious activities, family activities, and the like, and also that difficulties associated with "logging out" (telephoning the Health Management Division to request authorization to leave residence) prevented them from engaging in such activities.[5] Other plaintiffs complain

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5. *See* Monahan Compl. ¶¶ 30-36, 47; Aponte Compl. ¶¶ 69-82; Ball Compl. ¶¶ 23-33, 37-38; Basil Compl. ¶¶ 27-28, 33, 36, 46; Foynes Compl. ¶¶ 34-36, 42; Lorde Compl. ¶¶ 37-38, 44-45; Nardiello Compl. ¶¶ 25-43, 80; Netell Compl. ¶¶ 24-29, 39; Rebecca Compl. ¶¶ 24, 29-31, 39; Rodriguez Compl. ¶¶ 34-43; Silva Compl. ¶¶ 26, 35-41, 43-48, 56; Almodovar Compl. ¶¶ 45, 53-54, 57 (all *Almodovar* plaintiffs), 79-82 (plaintiff Almodovar), 105-116 (plaintiff Beckford), 142-146, 148-159 (plaintiff Bresloff), 186-203 (plaintiff Cohen), 224-227 (plaintiff Cuevas), 249-281 (plaintiff Deniro), 307-312 (plaintiff Griffin), 345-355 (plaintiff Ilarazza), 373-379 (plaintiff Israel), 406, 409, 417-419 (plaintiff Knowles), 745-751, 757 (plaintiff Tyson), 771-775 (plaintiff Varbero), 780-791, 799-801 (plaintiff Wallace), 825-839 (plaintiff Watford), 856-866 (plaintiff White), 881-887 (plaintiff Whyte-Phillips), 903-905 (plaintiff Whyte), 929-940 (plaintiff Keyes-Alston).

that they were punished for Directive violations that, in some cases, they deny took place.[6] Finally, certain plaintiffs allege that they were "harassed" by employees of the Health Management Division, who pressured them to return to duty, delayed or denied their promotions, wrongfully branded them as "sick leave abusers," or otherwise applied the Directive to them in an arbitrary manner.[7]

Most of these individual claims prove on inspection to be either sufficiently general or sufficiently inherent in a neutral application of amended Directive 2262 that they reasonably could have been raised, or, in some cases, were in fact raised in *Seabrook* and are consequently barred by res judicata. The remaining claims, such as alleged harassment, wrongful punishment, or disparate application

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6. *See* Ball Compl. ¶¶ 46-48; Basil Compl. ¶¶ 31-32, 35; Lorde Compl. ¶¶ 14-16, 31-32; Nardiello Compl. ¶¶ 28, 48-49, 70; Netell Compl. ¶¶ 23, 30-32; Rebecca Compl. ¶¶ 27-28; Silva Compl. ¶¶ 31, 33-34, 42; Almodovar Compl. ¶¶ 60-64 (all *Almodovar* plaintiffs), 118 (plaintiff Beckford), 204 (plaintiff Cohen), 282-283, 285 (plaintiff Deniro), 316 (plaintiff Griffin), 338, 341-344 (plaintiff Ilarazza), 371, 380-382 (plaintiff Israel), 758 (plaintiff Tyson), 776-777 (plaintiff Varbero), 792 (plaintiff Wallace), 867-868 (plaintiff White), 888 (plaintiff Whyte-Phillips), 925-928 (plaintiff Keyes-Alston).

7. *See* Aponte Compl. ¶¶ 23, 30-33; Nardiello Compl. ¶¶ 51, 53, 58- 59, 61-69; Netell Compl. ¶ 21; Rodriguez Compl. ¶¶ 12-22, 31-33; Silva Compl. ¶ 29; Almodovar Compl. ¶¶ 46 (all *Almodovar* plaintiffs), 95, 101, 119-120 (plaintiff Beckford), 134, 160-161 (plaintiff Bresloff), 318-321 (plaintiff Griffin), 338, 341-344 (plaintiff Ilarazza), 404 (plaintiff Knowles), 752-756 (plaintiff Tyson).

of the sick leave policy, while not barred by res judicata, nonetheless must likewise be dismissed because plaintiffs, in response to defendants' evidentiary showing that these Claims are without factual support, have utterly failed to meet their burden to set forth admissible evidence supporting these claims or otherwise demonstrating that a genuine issue of material fact exists for trial with respect to these claims. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Virtually conceding as much, plaintiffs counter with the extraordinary argument that it is "unfair" for them to be required to sift through the relevant deposition transcripts to find evidence supporting each of their claims. *See* Pl.Opp.Br. at 20. Similarly, they argue that "[i]t is physically impossible for plaintiffs to review forty (40) deposition transcripts and set forth each allegation which represents a constitutional violation under a particular amendment in a forty (40) page memorandum." *Id.* at 19.[8] Accordingly, plaintiffs oppose summary judgment on the as-applied claims largely by reference to the allegations in their Complaints

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8. Of course, the place for such references was not in plaintiffs' memorandum of law at all, see Local Civil Rule 56.1, but in their Rule 56.1 Statement, on which no page limit was set but which, nevertheless, is utterly bereft of record citations relating to the particulars of any of plaintiffs' claims of as-applied unconstitutionality. *Cf. Riley v. Town of Bethlehem*, 5 F.Supp.2d 92 (N.D.N.Y.1998) (denying motion for summary judgment for failure to supply record citations supporting statement of material facts); *see also Union Carbide Corp. v. Montell N.V.*, 179 F.R.D. 425 (S.D.N.Y.1998). Also, it must be remembered that 39 of the 41 depositions taken in this litigation were of plaintiffs themselves, who remained available to their counsel to supply appropriate affidavits.

(with occasional passing reference to deposition testimony not in the record of this motion),[9] and conclude that "[p]laintiffs' action for unconstitutionality cannot be dismissed if they have *alleged* any constitutional violation." *Id.* at 18 (emphasis supplied).

This strategy is squarely at odds with the requirements of Rule 56. "Simple assertions by counsel that there are facts in the case that should defeat summary judgment are, by their nature, conclusory and do not meet plaintiffs' burden in the face of a motion for summary judgment." *Sellin v. Rx Plus, Inc.*, 730 F.Supp. 1289, 1293 n. 3 (S.D.N.Y.1990). Nor is plaintiffs, position buttressed by their frequent fallback to rhetorical blends of bombast and bromide. Plaintiffs having failed to submit any admissible evidence in support of their "as applied" claims, those claims must be dismissed.

Similarly, plaintiffs have provided no admissible evidence in support of their claims that defendants engaged in a conspiracy, in violation of 42 U.S.C. § 1985(3), for the purpose of depriving plaintiffs of the equal protection of the laws or of their privileges and immunities under the law. *See Traggis v. St. Barbara's Greek Orthodox Church,* 851 F.2d 584, 586-87 (2d Cir.1988). In particular, plaintiffs provide no evidence that the "predominant purpose" of the alleged conspiracy "was interference with, or punishment for exercise of" such rights. *Spencer v. Casavilla,* 44 F.3d 74, 79 (2d Cir.1994). Therefore their claims pursuant to 42 U.S.C. § 1985(3) must be dismissed as well.

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9. The one other item on which plaintiffs purport to rely in this regard, the Affidavit of Ms. Knowles Johnson, simply repeats conclusions rather than avers admissible facts.

Finally, for the same reason, plaintiff Lorde's claim of disability discrimination in violation of New York State law, see Lorde Compl. ¶¶ 67-76, must be dismissed, Lorde having presented no admissible evidence from which a reasonable juror could conclude that any of the employment actions Lorde complains of were motivated by such discrimination.[10]

In sum, each of the plaintiffs' Complaints are hereby dismissed with prejudice. Clerk to enter judgment.

SO ORDERED.

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10. To the extent that plaintiffs' Complaints might also be somehow read to assert other State law causes of action, those claims must likewise be dismissed for failure to provide admissible evidence supporting such claims.